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Common Carriers--Negligence--Duty Toward Passenger Under Disability (O'Hanlon v. Murray, 285 N.Y. 321 (1941))

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the promisee, the subscription agreement is treated as a mere offer that may be revoked any time before it is accepted by the promisee.¹⁴ In these cases, the unilateral contract is said to arise when the promisee *commences* performance as an acceptance, and the courts do not follow the well-established rule of contract law that only full performance of the requested act will be deemed an acceptance of the offer.¹⁵ However, the position of the courts is in accord with the Restatement.¹⁶

Insofar as the noted policy of the courts to sustain the validity of these agreements whenever a counter promise of the promisee can be implied, or whenever the promisee has sustained any legal detriment in reliance upon the promised gift,¹⁷ is a wise and a desirable one, it would seem advisable for the courts to state frankly that these cases form an exception to the strict rules of consideration, and that the doctrine, as applied to charitable subscriptions, has been modified and qualified by the doctrine of promissory estoppel.¹⁸

E. D. R.

COMMON CARRIERS—NEGLIGENCE—DUTY TOWARD PASSENGER UNDER DISABILITY.—Plaintiff's intestate was waiting for a train in defendant's subway station when he fell upon the tracks. A fellow passenger and two station agents removed the deceased from the tracks and assisted him to a bench some eight feet from the edge of the platform. It was apparent that the man was laboring under a physical disability, but when this fact was pointed out to the station agent, he declined to take any action. Subsequently, plaintiff's intestate once again fell upon the tracks, and this time was killed by one of defendant's trains. Plaintiff contends (a) that the station agents

¹⁴ *Pratt v. Trustees*, 93 Ill. 475 (1879) (subscriber's offer was revoked by his death); *Cottage Street Methodist Church v. Kendal*, 121 Mass. 528, 23 Am. Rep. 286 (1877) (promisee had incurred no liabilities).

¹⁵ *Peterson v. Pattburg*, 248 N. Y. 86, 161 N. E. 428 (1928); *Sonino v. Magrini*, 225 App. Div. 536, 234 N. Y. Supp. 63 (1929); see *WHITNEY, CONTRACTS* (3d ed. 1937) § 34.

¹⁶ *RESTATEMENT, CONTRACTS* § 45, "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or if no time is stated therein, within a reasonable time."

¹⁷ Incurring liabilities or sustaining a detriment in reliance upon a promise is not consideration unless that act or detriment was requested by the promisor as the price for his promise. See *WHITNEY, CONTRACTS* (3d ed. 1937) § 45; *WILLISTON, CONTRACTS* (1924) § 112.

¹⁸ See *Cardozo, Ch. J., concurring in Allegheny College v. Nat. Chautauqua County Bank of Jamestown*, 246 N. Y. 269, 159 N. E. 173 (1927); *ASHLEY, CONTRACTS* (1911) § 40.

were negligent when deceased was first removed from the tracks, (b) that defendant's motorman was negligently operating the train and this negligence was the proximate cause of the death of the victim. The Appellate Division reversed a decision of the trial court in favor of the plaintiff.¹ On appeal, *held*, reversed and new trial granted. *O'Hanlon v. Murray*, 285 N. Y. 321, 34 N. E. (2d) 339 (1941).

At the time of the accident, the relationship of passenger and carrier was in existence between plaintiff's intestate and defendant.² This relationship imposes certain duties. Although a common carrier is not an insurer of the passenger's safety, there is a duty to exercise sufficient care to provide for the reasonable comfort and safety of the passenger.³ However, towards those incapable of caring for themselves, a greater duty is imposed on the carrier.⁴ Towards such persons, the carrier owes a duty to exercise sufficient care, in view of the disability, to prevent their being injured.⁵ This duty arises when the carrier becomes aware of the passenger's condition.⁶ In the instant case, when the station agent noted deceased's disability, defendant became bound to care for deceased until he was fit to resume travel or to place him in the custody of the proper officer. Defendant did neither. Thus, plaintiff's first contention was well founded.

However, the trial judge also permitted the case to go to the jury on the question of the negligent operation of the train. The jury was asked to decide whether, with the exercise of due care, defendant's motorman could have stopped the train in time to prevent the accident. The testimony on this point was uncorroborated and was contradicted by the witness himself on cross-examination. Therefore, no issue of fact was raised which should have been presented to the jury.⁷ Whether there is any evidence tending to prove a fact is a question of law.⁸ In the instant case, the Court of Appeals has

¹ Unanimously reversed on the ground that no actionable negligence of defendant was established. *O'Hanlon v. Murray*, 259 App. Div. 808, 19 N. Y. S. (2d) 655 (1st Dep't 1940). Motion for reargument being denied in 259 App. Div. 885, 20 N. Y. S. (2d) 1017 (1st Dep't 1940), plaintiff now appeals.

² *Sanchez v. Pacific Auto Stages*, 116 Cal. App. 392, 2 P. (2d) 845 (1931). "The relationship of carrier and passenger arises when the passenger enters with intent to pay or pays for entrance into the vehicle or carriage * * * It is not necessary in order to create the relation that the passenger should have actually entered the vehicle."

³ *Carroll v. Staten Island R. R.*, 58 N. Y. 126 (1874); *McPadden v. N. Y. Cent. R. R.*, 44 N. Y. 478 (1871).

⁴ *Wells v. N. Y. Cent. & H. R. R.*, 25 App. Div. 365, 49 N. Y. Supp. 510 (4th Dep't 1898).

⁵ *Fagan v. Atlantic Coast Line R. R.*, 220 N. Y. 301, 115 N. E. 704 (1917).

⁶ *Middleton v. Whitridge*, 213 N. Y. 499, 108 N. E. 192 (1915), *rev'd*, 156 App. Div. 154, 141 N. Y. Supp. 104 (1st Dep't 1913).

⁷ *Schlacter v. Dowling*, 257 App. Div. 1011, 13 N. Y. S. (2d) 628 (2d Dep't 1939).

⁸ 4 FORD, EVIDENCE (1st ed. 1935) 2781.

decided⁹ that the evidence adduced by plaintiff's witness was insufficient to present a question of fact.¹⁰ Since insufficient evidence is, in law, no evidence, it was improperly considered by the jury¹¹ and the case therefore was sent back for a new trial.

C. McC.

CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — POLICE POWER.—The petitioner, for himself and all others similarly situated, invokes the Fourteenth Amendment of the Federal Constitution and the Constitution of the State of New York¹ in support of his challenge to the validity of that part of a regulation² promulgated by the Board of Health of the City of New York, which requires of an applicant for a Class C permit³ that he "have been a *bona-fide* independent individual milk distributor in this city prior to June 1, 1939."⁴ A license having been denied him, he sought a mandatory order to compel the Board to grant him a license, and his motion was denied at Special Term. Upon leave to appeal to the Court of Appeals, *held*, three judges dissenting, affirmed. The power to regulate the issuance of licenses being discretionary under the New York City Charter,⁵ the issue in the case depends on whether or not the discretion has been abused and hence must be confined to a search in the record for facts which will justify its exercise in such a way as to work a limitation in favor of persons who were dealers prior to June 1, 1939. The record discloses that (1) those who were engaged as small distributors before June 1, 1939, through compliance with previous regulation of the Board of Health, had invested in capital equipment which might have been impaired by indiscriminate licensing of new competitors; (2) the milk market in New York City cannot sustain as many small dealers as there are applicants for Class C licenses; and (3) indiscriminate licensing would increase the number of dealers too greatly to admit of adequate supervision by the Board of Health, to the detri-

⁹ When the Appellate Division reverses a decision entered in plaintiff's favor upon a jury's verdict and dismisses the complaint upon the merits, the Court of Appeals must determine whether there was evidence which justified sending the case to the jury. *Cornbrooks v. Terminal Barber Shops*, 282 N. Y. 217, 26 N. E. (2d) 25 (1940).

¹⁰ See Rippey, J. (concurring in part in instant case, p. 324).

¹¹ *Race v. Krum*, 222 N. Y. 410, 118 N. E. 853 (1918); *Matter of Case*, 214 N. Y. 199, 108 N. E. 408 (1915).

¹ Art. I, § 11.

² Regulation 3-a, subd. 3-b(3).

³ To deal in milk as a one-vehicle dealer who does not maintain a pasteurization plant or milk depot but who utilizes the facilities of a plant or depot in New York City which is licensed by the Board of Health.

⁴ Regulation 3-a, subd. 3-b(3).

⁵ § 558-f.